

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

INLAND ASPHALT CO.,

Appellant,

v.

BENTON CLEAN AIR AUTHORITY,

Respondent.

PCHB NO. 05-111

**ORDER DENYING
SUMMARY JUDGMENT**

This is an appeal of Benton Clean Air Authority's (BCAA) Notice of Violation No. 04-0021, dated November 22, 2004 and subsequent Notice of Penalty issued to Inland Asphalt Co. (Inland) on February 9, 2005. The alleged violations concerned visible emissions from Inland's drum dryer-mixer and also the lack of corrective actions required by WAC 173-400-107(6)(c). However, at the Pre-Hearing Conference, BCAA withdrew its allegation of violation of WAC 173-400-107(6)(c) as stated in the Notice of Violation regarding corrective measures.

The Board deliberating on this motion consisted of Bill Clarke, Chair, and William H. Lynch. Cassandra Noble, Administrative Appeals Judge presided. The motion was decided on the written record before the Board consisting of:

1. Inland 's Motion for Summary Judgment, filed October 10, 2005;
2. BCAA's Response Opposing Petitioner's Motion for Summary Judgment, filed October 28, 2005;

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- 1 3. Inland's Reply Brief in Support of Motion for Summary Judgment, filed November 7,
2 2005; and
3 4. Inland's Petition for Review of Notice of Violation and Notice of Penalty No. 04-
0021, filed August 17, 2005.

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5 **FACTUAL BACKGROUND**

6 On November 22, 2004, BCAA issued a Notice of Violation for two violations. BCAA's
7 Notice of Violation set forth the factual details of the violations, as well as the permit conditions
8 believed to have been violated and applicable WAC and statutes:

9 (1) An inspector conducted an exhaust plume evaluation of Inland's baghouse
10 exhaust stack and concluded that the opacity readings gathered exceeded what
11 was allowed by Order of Approval #2002-0004 Condition 4.2.2¹ and WAC
173-400-040(1) concerning visible emissions; and

12 (2) The plant manager was unable to produce a qualitative assessment report and
13 did not take any immediate and appropriate corrective actions to minimize the
14 emissions, which was deemed to be a violation of Order of Approval #2002-
0004, condition 4.4.2.1 and WAC 173-400-107(6).

15 Benton Clean Air Authority Notice of Violation No. 04-0021, page1.

16 The Notice of Violation also included contained the following language:

17 ...the BCAA may issue a penalty under authority of RCW 70.94.430 or 70.94.431. For
18 clarification of the regulations as they pertain to the violation, or to discuss the issues
involved in this case, please call [the BCAA telephone number].

19 Benton Clean Air Authority Notice of Violation No. 04-0021, page 2.

20 _____
21 ¹ Neither party submitted copies of the permit conditions alleged to have been violated, neither in connection with
the Notice of Appeal nor with this motion.

1 Notice of Violation No. 04-0021 also contained a paragraph that notified Inland that it had 30
2 days to exercise an option to explain its position via a meeting, a phone conversation or a written
3 statement. BCAA stated that, after the 30 days, a penalty may issue.

4 On February 9, 2005, BCAA issued Notice of Penalty No. 04-0021. The total penalty
5 amount assessed for the two violations was \$7,325.00. The Notice of Penalty stated as follows:

6 The basis for this penalty is that you have been found to be in violation of RCW 70.94
7 and Washington Administrative Codes (WAC) 173-400-040 and 173-400-107(6)(c) and
8 Order of Approval #2002-2004, Conditions 4.2.2 and 4.4.4 as stated in Notice of
Violation 04-0021.

9 Benton Clean Air Authority Notice of Penalty No. 04-0021.

10 The penalty amount was composed of \$3,325.00 for the violation of Condition 4.4.4 and
11 \$4,000 for the violation of Condition 4.2.2, for the total penalty of \$7,325. At the Pre-Hearing
12 Conference in this matter, BCAA withdrew its allegation of violation of WAC 173-400-
13 107(6)(c) (the corrective action violation) leaving only the alleged violation of WAC 173-400-
14 040 (exceeding the allowable opacity of visible emissions).

15 ANALYSIS

16 Inland moved the Board for summary judgment in its favor dismissing BCAA's Notice of
17 Penalty as to Condition 4.4.4 in the amount of \$3,325. Inland argues that the Notice of Penalty is
18 deficient and without legal basis because it alleges that Inland violated two conditions of Order
19 of Approval No. 2002-0004: (1) Condition 4.2.2; and (2) condition 4.4.2.1. Inland asserts that
20 BCAA did not specify condition 4.4.4 or allege facts in the Notice of Violation. Therefore,
21 Inland asserts, the penalty imposed for a violation of Condition 4.4.4 must be dismissed in its

1 entirety. Inland refers to BCAA's withdrawal of the allegation of a violation of WAC 173-400-
2 107(6) and asserts that the remaining penalty of \$3,325 must be also be dismissed because of the
3 error on the Notice of Penalty.

4 BCAA asserts that the Notice of Violation clearly sets forth the grounds for the alleged
5 violations because it refers to Order of Approval #2002-0004 Conditions 4.2.2 and 4.4.2.1 as
6 well as the applicable WAC sections. Also, BCAA asserts, the Notice of Penalty correctly refers
7 to the WAC sections as well as Order of Approval Condition 4.2.2. BCAA asserts that an
8 inadvertent numerical reference is not grounds for overturning the assessment of a penalty under
9 the circumstances of this case. BCAA points out that the Notice of Penalty refers back to and is
10 based upon the Notice of Violation and that the alleged violations of two WAC provisions and
11 one violation of the Order of Approval condition still must be dealt with. BCAA suggests a
12 complete dismissal of the penalty assessment would be effectively meaningless, because the
13 Board still has the authority to allow an amendment to the Notice of Penalty, and the BCAA
14 could issue a new notice of penalty, only resulting in a new appeal. BCAA argues that, in any
15 event, Inland has not been prejudiced.

16 The issue raised in this Motion for Summary Judgment is essentially one of notice and
17 due process. Notices of violation must apprise their subject of the nature and character of
18 proposed administrative action or of proceedings taking place that might affect the person to
19 enable them to intelligently respond and/or prepare for a hearing. Due process always requires
20 notice reasonably calculated to apprise parties of the nature and character of proceedings that

1 will affect them. Notice is adequate if it discloses the nature of a proposed administrative action
2 and if there is no showing that anyone was actually misled by the notice. *Nisqually Delta Ass'n*
3 *v. DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985). The essence of proper notice is fairness
4 to affected parties:

5 One of the basic touchstones of due process in any proceeding is notice
6 reasonably calculated under all the circumstances to apprise affected parties of the
7 pending action and afford them an opportunity to present their objections.
8 *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965).

9 *Barrie v. Kitsap county et al.*, 84 Wn.2d 579, 585, 527 P.2d 1377 (1974).

10 A case with factual similarities arose in 2004 in the context of a land use appeal. Citation
11 to a specific ordinance was missing from a notice. Division II of the Court of Appeals addressed
12 the contention that a cease and desist order failed to comply with required due process because it
13 did not specify the specific title, chapter and section of the county code that had been alleged to
14 be violated. *Young v. Pierce County*, 120 Wn.App. 175, 188, 84 P.3d 927 (2004). The Court of
15 Appeals looked at the record as a whole of the different communications, postings and mailings
16 that the County provided to the subjects of the cease and desist order, and at the order itself. The
17 court determined that the detail of the various communications was sufficient to give notice of
18 the ordinance that was at issue and of the conduct that allegedly violated the ordinance.

19 Therefore there was no showing of error prejudicial to substantial rights or that affected the
20 outcome of the case. Therefore the omission of the specific section violated was harmless and
21 not a basis for relief. *Young*, at 189 (2004).

1 In this case, Inland was provided with a detailed statement of the alleged violation in
2 Notice of Violation No. 04-0021 that included exact readings from the observations and
3 measurements of a qualified inspector. Also, citations were provided to applicable statute,
4 WAC, and to the permit conditions alleged to have been violated. Importantly, in the Notice of
5 Violation, Inland was provided with an opportunity to explain its position to the agency via a
6 meeting, a phone conversation or a written statement. Inland was specifically invited to contact
7 BCAA for clarification of the regulations as they pertained to the violation or to discuss the
8 issues involved in the case, along with a phone number. Notice of Violation No. 040-0021,
9 page 2.

10 The Board concludes that Inland was provided with the components of due process in this
11 case: (1) details concerning the nature of the violation; (2) what was required to correct the
12 violations; (3) the actions that would be taken by BCAA if Inland did not communicate and
13 convince the agency of another way to address the problem and any mitigating circumstances;
14 and (4) Inland's right to a hearing to appeal to either the BCAA Director or Board of Directors,
15 or to this Board. Also, the Notice of Penalty complained of here referred back to and effectively
16 incorporated the statements in the Notice of Violation by that reference. Viewing the entirety of
17 the information and material provided in the notices, the Board concludes that Inland was
18 adequately apprised of the nature and character of the proceedings against it. Finally, there has
19 been no showing that Inland was misled by the notices.

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The Board concludes that there were no significant procedural irregularities with regard to the notices provided to Inland about the nature of violations and the conduct that gave rise to the charges. The notices given in this matter met the requirements of due process. Based on the foregoing, the Board enters the following:

ORDER

Appellant's Motion for Summary Judgment Motion is DENIED and this matter shall proceed to hearing.

DONE this 30th day of November 2005.

POLLUTION CONTROL HEARINGS BOARD

BILL CLARKE, Chair

WILLIAM H. LYNCH, Member

Cassandra Noble, Presiding
Administrative Appeals Judge